No. 184

In the Supreme Court of the United States

OCTOBER TERM, 1942

HENRY A. KIESELBACH AND MRS. OLGA M. KIESELBACH, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 33–37) is reported at 44 B. T. A. 279. The opinion of the Circuit Court of Appeals (R. 42–50) is reported at 127 F. (2d) 359.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 7, 1942. (R. 50.) The petition for a writ of certiorari was filed June 27, 1942, and granted October 12, 1942, but the writ was limited to the first question presented by the

petition. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

A condemnation award to taxpayer for land taken by the City of New York included interest calculated at 6% per annum upon the value of the land at the date of the taking, and running from that date until payment of the award. Is that interest taxable as ordinary income or is it part of taxpayer's capital gain taxable to the limited extent provided for in Section 117 (a) of the Revenue Act of 1936?

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648;

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * * *

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) *Definition of Capital Assets.*—For the purposes of this title, "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

* * * * *

Pertinent excerpts from the Greater New York Charter will be found in the Appendix, *infra*, pp. 23–26.

STATEMENT

The facts were stipulated (R. 27–33) and found by the Board of Tax Appeals as stipulated (R. 34). They may be summarized as follows:

On April 2, 1927, taxpayer, Henry A. Kieselbach, inherited from his father a parcel of real property in the City of New York. In 1930 the city began condemnation proceedings in the Supreme Court of New York and an order was entered authorizing the taking of most of the property and providing that just compensation

would be determined by the court. Taxpayer[1] filed a formal application for compensation. (R. 34.)

On December 16, 1932, the Board of Estimates and Apportionment of the City of New York passed a resolution that fee title to the property should pass to the city on January 3, 1933. This was in accordance with Section 976 of the New York City Charter, which provided that such a resolution should be effective to vest title in the city (see Appendix, *infra*). The city took possession on the latter date, and rents thereafter accruing were collected by or turned over to the city. (R. 32, 34–35.)

On March 31, 1937, the court entered a final decree in the condemnation proceeding awarding $73,246.57 to the petitioners as "just compensation," and the award was paid on May 12, 1937. It was computed by adding to a $58,000 principal amount interest thereon at 6% per annum from January 3, 1933, when the city first took title and possession, until May 12, 1937, the date of payment. (R. 30–31, 35.)

The Commissioner in his deficiency notice determined that the portion of the award computed as interest was taxable as ordinary income in 1937, and was not part of the price contributing to

[1] "Taxpayer" is used herein to refer to Henry Kieselbach, owner of the condemned property. Olga Kieselbach, his wife, is involved here because a joint return was filed. (R. 28.)

capital gain. (R. 10–11.) The Board of Tax Appeals reversed the Commissioner (R. 36–37), but was in turn reversed by the Circuit Court of Appeals (R. 42–50).

SUMMARY OF ARGUMENT

Interest upon the price paid for property is compensation for the use of capital; it is ordinary income and is not part of the amount realized upon the disposition of the property which determines the capital gain (or loss) resulting from the disposition. The separable character of such interest has been recognized whenever it was separately computed in the agreement of the parties, or under the mandate of the statute authorizing its payment. In the instant case, taxpayer's property was condemned pursuant to the Greater New York Charter, which required just compensation to the owner at the date of the taking of his property, plus interest thereon from that date until the date of payment of the compensation. The amount awarded to taxpayer in the instant case was computed in that way. The portion of the award designated as interest was properly treated as ordinary income (not capital gain) by the Circuit Court of Appeals.

ARGUMENT

THE PORTION OF THE CONDEMNATION AWARD COMPUTED AS INTEREST WAS TAXABLE AS ORDINARY INCOME, AND NOT AS CAPITAL GAIN

1. The issue involved herein is narrow. The City of New York acquired title to the taxpayer's

property on January 3, 1933, but the final decree fixing the amount of the award was not entered until March 31, 1937. The award was paid on May 12, 1937; it consisted of a principal amount of $58,000 together with interest in the amount of $15,246.57, computed at 6% per annum from January 3, 1933 to May 12, 1937. The interest was awarded in accordance with Section 976 of the Greater New York Charter, which provides (see Appendix, *infra*, p. 24):

> * * * Interest at the legal rate upon the sum or sums to which the owners are justly entitled upon the date of the vesting of title in the city of New York, as aforesaid, from said date to the date of the final decree shall be awarded by the court as part of the compensation to which such owners are entitled. * * *

The question is whether the profit represented by the payment of such interest is to be treated as ordinary income taxable in full at the usual surtax rates, or whether it is to be treated merely as capital gain. We submit that the court below correctly classified such interest as ordinary income.

The Board of Tax Appeals originally ruled that such interest constituted ordinary income. *Jamieson Associates, Inc.* v. *Commissioner*, 37 B. T. A. 92. However, the decision was reversed *sub nom Seaside Improvement Co.* v. *Commissioner*, 105 F. (2d) 990 (C. C. A. 2d), and the Board there-

after followed the Second Circuit.[2] But the Second Circuit itself became somewhat uncertain as to the correctness of its decision, for in *Commissioner* v. *Appleby's Estate*, 123 F. (2d) 700, 701 (C. C. A. 2d), it observed that it felt constrained to follow the *Seaside* case "though if the matter were tabula rasa not all of the court as now constituted would reach that conclusion." The court below in the instant case, on the other hand, did not feel itself bound by any prior decision on this issue, and approved the position originally taken by the Board of Tax Appeals.

2. Section 111 (a) of the Revenue Act of 1936 defines gain from the sale or other disposition of property as "the excess of the amount realized therefrom over the adjusted basis." In this case, the amount realized from the condemnation sale of the taxpayer's property was the principal amount of the award, $58,000. To the extent that this amount exceeded the taxpayer's basis, such excess[3] constituted capital gain. But the interest

[2] In addition to the decision in the instant case, the Board followed the *Seaside* case in several unreported decisions as well as in *Appleby* v. *Commissioner*, 41 B. T. A. 18, affirmed by the Second Circuit as noted above; *Barbour* v. *Commissioner*, 44 B. T. A. 1117, pending an appeal to C. C. A. 6th; *Brown* v. *Commissioner*, 47 B. T. A. 139, pending on appeal to C. C. A. 2d; and *Pioneer Real Estate Co.* v. *Commissioner*, decided October 13, 1942, 47 B. T. A. No. 120.

[3] After making certain adjustments and deducting the depreciated basis from the $58,000, there was $11,891.94 of net capital gain reflected in the principal amount of the award. (R. 13.)

on that principal amount, computed, as it was, from the date of taking, was compensation to the taxpayer for the delay in payment; it was ordinary income rather than capital gain for it did not represent payment for the property. Just compensation required not only that the owner be made whole with respect to the full value of the property as of the date of taking, but also that he be given an additional amount to indemnify him for the delay in payment.

That additional amount, as thus computed, is commonly known as interest, and indeed was expressly characterized as "interest" in Section 976 of the New York Charter. It is that common understanding in the business world which was regarded as significant in other circumstances. Cf. *Deputy* v. *duPont*, 308 U. S. 488, 498;[*] *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560–561. The interest herein was paid to the owner, not in exchange for his property, but rather for the failure to compensate him promptly

[*] *Deputy* v. *duPont* involved charges paid with respect to borrowed securities. Unlike the interest in the instant case, those charges were not computed at a fixed percentage on a fixed principal amount. The Court therefore held that they did not constitute interest as that term is commonly understood. In any event, the question here is whether the amount in question constitutes ordinary income rather than capital gain, and even in the situation presented by *Deputy* v. *duPont*, there could be no question that the amounts paid for the use of the stock were ordinary income rather than capital gain to the lender.

for that property. Moreover, it was true interest because it was based upon the amount of money owed by the city; i. e., the value of the property on the date of taking, and was computed at a customary rate "according to lapse of time." *Meilink* v. *Unemployment Comm'n.*, 314 U. S. 564, 569. Cf. *Helvering* v. *Midland Ins. Co.*, 300 U. S. 216; *Wolf* v. *Commissioner*, 84 F. (2d) 390 (C. C. A. 3d); *Scripps* v. *Commissioner*, 96 F. (2d) 492, 495 (C. C. A. 6th), certiorari denied, 305 U. S. 625; *Plunkett* v. *Commissioner*, 118 F. (2d) 644 (C. C. A. 1st); *Arcadia Refining Co.* v. *Commissioner*, 118 F. (2d) 1010 (C. C. A. 5th); *Journal Co.* v. *Commissioner*, 125 F. (2d) 349 (C. C. A. 7th); *Estate Planning Corp.* v. *Commissioner*, 101 F. (2d) 15 (C. C. A. 2d); *Fairmont Creamery Corp.* v. *Helvering*, 89 F. (2d) 810 (App. D. C.).

But regardless of whether the amount in question may strictly be characterized as "interest" for all purposes, it certainly was not paid *in exchange* for the property, and therefore cannot in any event be treated as capital gain. Thus, if a vendor should retain a purchase money mortgage, the interest payable annually by the vendee over a period of years plainly would be ordinary income and not capital gain. The reason is that such interest would not be regarded as the consideration received in exchange for the property; rather, it would represent payment to the vendor

for his forbearance in demanding immediate payment of the principal amount. In the case of the ordinary sale, such interest is determined by the voluntary agreement between the parties. Although the transaction here is involuntary, the legislature nevertheless undertakes to compensate the former owner in precisely the same manner. The additional payment here, as in the case of the voluntary sale, indemnifies the owner for his delay in receiving the price for his property, and is directly proportionate to the lapse of time between passage of title and ultimate payment. That additional compensation does not constitute capital gain; it represents ordinary income taxable in full at the usual surtax rates.[8]

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[8] The mere fact that the sale is involuntary cannot change the operation of the capital gains and losses provisions. Cf. *Helvering* v. *Hammel*, 311 U. S. 504; *Helvering* v. *Nebraska Bridge Supply & Lumber Co.*, 312 U. S. 666, reversing *per curiam*, 115 F. (2d) 288 (C. C. A. 8th); *Hawaiian Gas Products* v. *Commissioner*, 126 F. (2d) 4 (C. C. A. 9th), certiorari denied, No. 231, present Term.

[9] Section 976 of the Greater New York Charter provided that interest should accrue only until the date of the final decree awarding compensation. However, the decree awarding compensation like any other money judgment, drew interest from the date of its entry. Greater New York Charter, as amended by Laws of 1932, c. 391, Section 981; *Matter of City of New York (Chrystie St.)*, 264 N. Y. 319; *Matter of Mott Haven Canal Docks*, 196 N. Y. 175; *Woodward-Brown R. Co.* v. *City of New York*, 235 N. Y. 278; *Matter of East River Land Co.*, 206 N. Y. 545. Cf. Gilbert-Bliss Civil Practice Act, Section 481.

The final decree in the instant case was entered on March 31, 1937, about a month and a half before payment of the

3. Petitioner relies upon several lines of cases, none of which is controlling here.

(a) Heavy reliance is placed upon a group of decisions holding that interest in a condemnation award is an essential element of just compensation. *United States* v. *Klamath Indians*, 304 U. S. 119; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496; *Phelps* v. *United States*, 274 U. S. 341; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106; *Liggett & Myers* v. *United States*, 274 U. S. 215.

These cases were concerned with resolving an apparent conflict between the Constitution, which guarantees just compensation for condemned property, and the well established principle that

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award. Though the stipulation is not clear upon the point, it is a reasonable inference that the computation was made in accordance with the law. If so, the figure $15,246.57 would consist of interest at 6% per annum on $58,000 from January 8, 1933, to March 31, 1937, when the decree was entered, plus interest, on both the principal and interest amounts of the decree from March 31, 1937, until May 12, 1937, the date of payment. The interest figure of $15,246.57 can be approximately arrived at only if the computation is made in this way. Accordingly, even if the Court should agree with the taxpayer as to the interest from the date of taking until March 31, 1937, it is plain that the interest computed upon the total amount of the award from the date of the final decree containing the award to the date of payment was nevertheless interest in the truest sense of the word; and the case in any event should be remanded with directions to treat at least that much of the payment to the taxpayer as ordinary income rather than capital gain.

the United States is not liable for interest upon claims against it in the absence of a specific statute. Despite the absence of such a statute, these cases held that the owner was entitled to the equivalent of interest upon the value of his property from the date of taking until the payment of the award. In *United States* v. *Klamath Indians, supra,* the Court observed (p. 123) that though it was not "quite accurate" to speak of "interest as such" as an element of just compensation, nevertheless the owner was entitled to the—

> value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. * * *

Similarly, in *Seaboard Air Line Ry.* v. *United States, supra,* the Court noted (p. 306) that no statutory command to include interest in a condemnation award is necessary "when interest or its equivalent" is part of the just compensation guaranteed by the Constitution. It further stated that "Interest at a proper rate is a good measure by which to ascertain the amount so to be added" to value at the time of taking in order to arrive at just compensation.

The New York cases are to the same general effect; just compensation includes two elements, namely, the value of the property at the date of taking, and the equivalent of interest thereon to the date of payment. *Matter of the City of New*

York (Bronx River Parkway), 284 N. Y. 48; *Matter of Minzesheimer*, 144 App. Div. (N. Y.) 576, 579, affirmed with approval of opinion below, 204 N. Y. 272; *Matter of Mott Haven Canal Docks*, 196 N. Y. 175; *Matter of Starr*, 198 App. Div. (N. Y.) 859, affirmed, 236 N. Y. 592; *Matter of City of New York* (West 151st St.), 222 N. Y. 370, 372–373.

If the cases just discussed say that interest upon the principal amount of a condemnation award is technically not interest, they also say that it is the same sort of thing, namely, compensation for the use of the owner's capital computed for the period during which he is deprived of its use. Compensation for the use of capital, whether it be "interest" or not, is not compensation for the conversion of the capital itself. Hence, in requiring additional compensation for the delay in payment, the decisions relied upon by the taxpayer (Br. 19–23) in reality support the Commissioner's position and the conclusion of the court below.

(b) Petitioner contends that (Br. 24) the interest payments upon a condemnation award are not ordinary income in the light of *United States Trust Co. of New York* v. *Anderson*, 65 F. (2d) 575 (C. C. A. 2d), certiorari denied, 290 U. S. 683; *Williams Land Co.* v. *United States*, 31 F. Supp. 154 (C. Cls.); *Posselius* v. *United States*, 31 F. Supp. 161 (C. Cls.); *Holley* v. *United States*, 124 F. (2d) 909 (C. C. A. 6th), certiorari

denied, 316 U. S. 685; *Baltimore & O. R. Co.* v. *Commissioner*, 78 F. (2d) 460 (C. C. A. 4th). Those cases deal with Section 22 (b) (4) of the revenue law which exempts from tax "interest upon the obligations of a State," and they hold that interest upon a condemnation award is not exempt under those provisions. The theory of the decisions is that Section 22 (b) (4) was intended to relate only to obligations issued under the borrowing power of the state or municipality. In holding such interest taxable, there is not the remotest suggestion that it constitutes capital gain rather than ordinary income; and indeed an examination of the records in those cases discloses that, wherever anything turned upon the difference between capital gain and ordinary income, the interest was apparently treated as ordinary income.[1]

[1] The records in those cases, except *Baltimore & O. R. Co.* v. *Commissioner*, reveal that the condemnation interest was apparently taxed as ordinary income, and was not treated as part of the price paid for the property. In the *Baltimore & Ohio* case, the Commissioner first computed gain with reference to the principal amount of the award, and added the interest as taxable income (78 F. (2d) at pp. 463–464); the court separately (p. 464) treated the "gain" which was held "clearly taxable", and the "interest" which was said to be "also taxable"; however it was not there material whether the interest was taxed separately or as part of the gain, because the Revenue Act of 1926, there applicable, did not give any capital gain advantage to a corporate taxpayer. See Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 208.

(c) The taxpayer relies (Br. 25) upon three cases involving awards made by the Mixed Claims Commission for property of American citizens seized by Germany during the last war. *Drier* v. *Helvering*, 72 F. (2d) 76 (App. D. C.); *Commissioner* v. *Speijer*, 77 F. (2d) 824 (C. C. A. 2d); certiorari denied, 296 U. S. 631; *Helvering* v. *Drier*, 79 F. (2d) 501 (C. C. A. 4th). The last two cases are wholly inapplicable. In each an award had been made specifying the principal and interest to be paid; payments were thereafter made under the awards in amounts that were insufficient to satisfy the principal of the awards. It was held in both cases that the amounts paid must be allocated to principal, and since they were less than the basis of the property seized, the courts ruled that the taxpayers had not received any income whatever, whether capital gain or ordinary income. Those decisions are therefore sharply distinguishable from the present case where the interest awarded and actually paid represents a profit to the taxpayer.

In the first *Drier* case both the principal and interest under the award were fully paid, but even when taken together they constituted less than the basis of the property seized, with the result that the taxpayer sustained a net loss. That case is thus distinguishable; but even if it were not, the court's refusal to consider the interest separately until the basis had been returned is

probably erroneous under the decisions of this Court. *Helvering* v. *Midland Ins. Co.*, 300 U. S. 216; cf. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359; *United States* v. *Ludey*, 274 U. S. 295.

(d) The taxpayer relies further (Br. 13–14) upon a group of cases involving installment sales where the vendee undertook to pay for the goods purchased by a series of fixed periodic payments.* *Hundahl* v. *Commissioner*, 118 F. (2d) 349 (C. C. A. 5th); *Daniel Bros. Co.* v. *Commissioner*, 28 F. (2d) 761 (C. C. A. 5th); *Henrietta Mills* v. *Commissioner*, 52 F. (2d) 931 (C. C. A. 4th). See also *MacDonald* v. *Commissioner*, 76 F. (2d) 513 (C. C. A. 2d). In those cases the installments were merely lump sum payments and did not include any interest as such. Although the contracts specified neither a rate of interest nor a principal amount, the vendee nevertheless sought to have the payments artificially broken down into "principal" and "interest", and unsuccessfully

* Taxpayer has also relied (Br. 13–15) upon cases involving payments of charges which had accrued at the date of purchase and which were treated as capital expenditures (*Magruder* v. *Supplee*, 316 U. S. 394; *Helvering* v. *Winmill*, 305 U. S. 79; I. T. 3254, 1939–1 Cum. Bull. 98); and upon a case where the computation of the price as of the date of delivery included an element denominated interest which had accrued prior to delivery (*Pratt-Mallory Co.* v. *United States*, 12 F. Supp. 1020 (C. C[illegible]). None of these cases is like the instant case, which involved interest on the price computed according to lapse of time *following* delivery of title and possession.

claimed a deduction on account of the interest so computed. The rationale of those decisions is that a written agreement may not be varied in a collateral tax proceeding so as to convert part of the stated purchase price into interest. Furthermore, since these decisions relate to deductions, the right to which must be clearly shown,[9] they would not necessarily control the question of the nature of the income received by the seller.

In the instant case, on the other hand, interest was required to be separately computed under Section 976 of the New York charter. It must be assumed that the condemnation decree followed the statutory mandate in this respect (*Matter of Minzesheimer, supra; Matter of Mott Haven Canal Docks, supra; Matter of Starr, supra*), and the stipulation of the parties (R. 30–31) confirms this assumption.[10]

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[9] *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, 49, and cases there cited. See also *Helvering* v. *Ohio Leather Co.*, Nos. 40–42, present Term, decided November 9, 1942.

[10] Although the condemnation decree is not part of the record herein, taxpayer does not argue that the separate computation of principal and interest was not revealed in the decree or schedules attached to or incorporated in it. Indeed, in view of the stipulation (R. 30–31) that the awarded payment was computed by adding interest to principal, as required by Section 976 of the Greater New York Charter, taxpayer could not make such an argument in absence of more specific proof. Taxpayer bore the burden of showing that the Commissioner's determination (R. 10–12) was erroneous. *Helvering* v. *Taylor*, 293 U. S. 507, 515.

(e) Finally, petitioner seeks (Br. 15–16) to analogize this case to *Carrano* v. *Commissioner*, 70 F. (2d) 319 (C. C. A. 2d); *Wolf* v. *Commissioner*, 77 F. (2d) 455 (C. C. A. 9th); *Christian Ganahl Co.* v. *Commissioner*, 91 F. (2d) 343 (C. C. A. 9th), certiorari denied, 302 U. S. 748; *Central & Pacific Imp. Corp.* v. *Commissioner*, 92 F. (2d) 88 (C. C. A. 9th); and G. C. M. 20322 (1938–2 Cum. Bull. 167), approving *Palladium Amusement Co.* v. *Commissioner*, 37 B. T. A. 149. In each of those cases there had been condemned a *portion* of a parcel of real estate, and the award had been reduced by an assessment for benefits with respect to the other portion retained by the owner. The *Carrano* case held that the owner's profit should be measured by deducting from the face amount of the award, before offset, the owner's cost increased by the assessment; the parties had conceded that the cost of the two portions was recoverable as a unit, and was not allocable between them. In reaching substantially the same result, the other cases held that the owner's gain should be measured by deducting the owner's cost, as it stood prior to the condemnation, from the amount of the award reduced by the assessment. Their theory seems to have been that no income was realized from the portion of the award which was offset by the assessment, for to that extent the owner could show nothing but an enhanced value in the retained property. The correctness of this theory is, we think, open to

serious question. Cf. *Helvering* v. *Bruun*, 309 U. S. 461; *Pioneer Real Estate Co.* v. *Commissioner*, 47 B. T. A. No. 120.

But regardless of the soundness of those cases, they are not in point here. None dealt with an interest problem. In all, the object was to arrive at the correct principal amount of the award and the correct gain resulting therefrom. In each the amount of the award actually involved in the decision, after reduction by the assessment, appears to have been paid simultaneously with the taking of the property.[11]

On the other hand, the instant case involves an award which included interest for the reason that the property had been taken by the city long before payment. The problem here relates to the treatment of this interest, and not to the treatment of an offsetting assessment. Although the deficiency notice and stipulation, when read together, indicate that a portion of taxpayer's

[11] The condemnation statutes involved seem to allow for such a procedure. See California Statutes of 1903, c. 268, pp. 376–386, alluded to in the Ninth Circuit cases; General Statutes of Connecticut, 1918, Sections 5183, 5186, 5194 (and cf. Sections 1433–1440), apparently involved in the *Carrano* case; and the Missouri statutes described in the *Palladium Amusement* case.

In the *Palladium Amusement* case, where the award was offset by certain general and special taxes, as well as benefit assessments, the award was treated for tax purposes as reduced only by the benefit assessments, and the owner was charged with income in the amount withheld for general and special taxes.

land was not condemned but was the subject of a small benefit assessment, nevertheless the wording of the stipulation requires the inference that both principal and interest awarded were paid to the taxpayer without reduction on account of the assessment, and that the payment of the assessment by the taxpayer was an entirely separate transaction. (R. 13, 27–32.) The assessment might have been offset against the amount due under the award, under the applicable New York statutes; but this was not required, and it is apparent that the assessment was in no sense an element of the award under those statutes. Greater New York Charter, as amended, Sections 970–976, 981, 984–988; see in particular Sections 987 and 988. *Matter of Fischer,* 149 App. Div. N. Y.) 618; *Matter of Bankers Investing Co.,* 141 App. Div. (N. Y.) 591. In fact, if there had been an offset it might very well have been effected after the date of the award, in which case it would have reduced not just the award, but the taxpayer's total claim against the city consisting of the amount of the award itself (principal and interest) plus interest on that amount accruing from the date of the award. See Greater New York Charter, Section 988, and fn. 6, *supra.*[12]

[12] In his deficiency notice the Commissioner conceded that the condemnation sale resulted in a capital gain measured by the principal amount of the award, but asserted that the interest was ordinary income. In that computation he offset the assessment, as well as attorney's fees paid in connection with the condemnation, against the principal amount of the

CONCLUSION

The decision of the Circuit Court of Appeals in the instant case was correct, and should be affirmed.

Respectfully submitted,

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DECEMBER 1942.

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award in arriving at taxpayer's gain. (R. 13.) In view of what is said above, the propriety of reducing the gain by the assessment may well be doubted. However, taxpayer's argument to the contrary notwithstanding (Br. 26–27), we think that the attorney's fees were properly deducted in this computation. It would be difficult to show that any part of these fees was allocable to the securing of the interest, which was clearly payable by statute once the principal amount of the award was ascertained.

By his amended answer (R. 16–23) the Commissioner asserted for the first time before the Board of Tax Appeals that the entire gain from the condemnation was ordinary gain, on the theory that there was no "sale" within the meaning of Section 117. In his computation of tax attached to this answer (R. 22) the Commissioner, quite understandably, did not distinguish between the principal and interest portions of the award. This is the computation referred to by the taxpayer in fn. 7 at p. 26 of his brief.

Since the Commissioner has abandoned the contention made in his amended answer, and returned to the position taken in his deficiency notice, the computation in the amended answer has no significance in the present discussion.

APPENDIX

Greater New York Charter, Chapter XVII, Title 4, Article I:

The city may acquire real property for streets, parks, et cetera.

SEC. 970. The city of New York may acquire title either in fee or to an easement, as may be determined by the board of estimate and apportionment, for the use of the public, to all or any of the real property required for streets and court-yards abutting streets, and for parks, parkways, playgrounds, approaches to bridges and tunnels and sites or lands above or under water for bridges and tunnels, and sites or lands above or under water for all improvements of the navigation of waters within or separating portions of the city of New York for the improvement of the waterfronts of the city of New York, or part or parts thereof, heretofore duly laid out upon the map or plan of the city of New York, of the city of Brooklyn, or Long Island City, or of any of the territory consolidated with the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York or hereafter duly laid out upon the map or plan of the city of New York, as herein constituted, and cause the same to be opened, or acquire title as above stated to such interests in real property as will promote public utility, comfort, health, enjoyment, or adornment, the acquisition of which is not elsewhere provided for. The board of estimate and ap-

portionment may specify what use is required of the real property which it may determine shall be acquired for public use, and the extent of such use, and may direct the same to be acquired whenever and as often as it shall deem it for the public interest so to do. * * * In proceedings authorized by the board of estimate and apportionment after the first day of January, nineteen hundred and seventeen, the compensation to which the owners of real property to be acquired for the use of the public for the purposes specified in this section, shall be ascertained and determined by the supreme court without a jury in the manner and according to the procedure prescribed by this title, and on and after said date the city of New York shall make application to the court, or cause application to be made to the supreme court in a county within the city of New York and within the judicial district in which the real property to be acquired is situated, to have the compensation, which should justly be made to the respective owners of the real property proposed to be acquired, ascertained and determined by the said court, without a jury, and to have the cost of the improvement, or such portion thereof as the board of estimate and apportionment shall direct, assessed by the court upon the real property deemed by the board of estimate and apportionment to be benefited thereby. (*As amended by L. 1922, ch. 563.*)

Vesting of title in the city to real property taken for streets or parks or other purposes.

SEC. 976. The title to the real property lying within the lines of any improvement,

authorized herein, shall be vested in the city of New York upon the date of the filing of the damage map in the proceeding, provided, however, that the board of estimate and apportionment may direct, by a resolution adopted by a three-fourths vote, that the title shall be vested in the city of New York upon the date of the entry of the order granting the application to condemn or upon the filing of the final decree, as provided for in this title, or upon such other date as may be specified in said resolution, but not later than the date of the filing of the final decree. Upon the date of the entry of the order granting the application to condemn, or of the filing of the damage map in the proceeding, as the case may be, or upon such subsequent date as may be specified by resolution of said board, the city of New York shall become and be seized in fee of or of the easement, in, over, upon or under, the said real property described in the said order or damage map, as the board of estimate and apportionment may determine, the same to be held, appropriated, converted and used to and for such purpose accordingly. Interest at the legal rate upon the sum or sums to which the owners are justly entitled upon the date of the vesting of title in the city of New York, as aforesaid, from said date to the date of the final decree shall be awarded by the court as part of the compensation to which such owners are entitled. The reversal on appeal of the final decree shall not divest the city of title to the real property affected by the appeal. Upon the vesting of title the city of New York, or any person or persons acting under its authority, may immediately, or

any time thereafter, take possession of the real property so vested in the city, or any part or parts thereof, without any suit or proceeding at law for that purpose. * * *

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The title in fee acquired by the city of New York to real property required for all purposes provided for in this title, except street and courtyard purposes, shall be a fee simple absolute. (*As amended by L. 1932, ch. 391.*)

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